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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 37

BRUCE WILSON, PETITIONER

v.

MAJOR GENERAL JOHN F. BOHLENDER, COMMANDER, FITZSIMONS ARMY HOSPITAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT[1]

OPINION BELOW

The opinion of the District Court (R. 60–72) is reported at 167 F. Supp. 791.

JURISDICTION

The order of the District Court, denying the petition for a writ of habeas corpus, was entered on November 10, 1958 (R. 72). Notice of appeal to the Court of Appeals was filed on December 2, 1958, and the record was docketed in that court on December 23, 1958 (R. 73–74). The case has not been heard or decided by the Court of Appeals. Certiorari was al-

[1] On March 6, 1959, a stipulation was filed in this Court in which the parties agreed to reverse the usual briefing procedure. Accordingly, this brief for the respondent is being filed first.

lowed by this Court on February 24, 1959 (R. 75–76). 359 U.S. 906. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a United States civilian employed by the United States Army in Berlin may validly be tried by court-martial, pursuant to Article 2(11) of the Uniform Code of Military Justice, for non-capital offenses committed abroad.

2. Whether a United States civilian employee of the Army who committed offenses in Berlin, Germany, in 1956, was amenable to trial by court-martial pursuant to Article 18 of the Uniform Code of Military Justice.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the Constitution are involved:

> Article I, Section 8. The Congress shall have Power * * *
>
> Clause 10. To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
>
> Clause 11. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
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> Clause 12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> * * * * *
>
> Clause 14. To make Rules for the Government and Regulation of the land and naval Forces;
>
> * * * * *

Clause 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * *

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The pertinent Articles of the Uniform Code of Military Justice, Act of May 5, 1950, c. 169, Section 1, 64 Stat. 108, 109, 114, provide as follows:[2]

Article 2 [50 U.S.C. 552] *Persons subject to the code.* The following persons are subject to this code:

* * * * *

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of inter-

[2] The Uniform Code of Military Justice was enacted into positive law in Title 10 U.S.C. and became effective as such on January 1, 1957. Petitioner's trial occurred prior to that date. Accordingly, references in this case are to Title 50.

national law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;

* * * * *

Article 18 [50 U.S.C. 578] *Jurisdiction of general courts-martial.* Subject to article 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code, including the penalty of death when specifically authorized by this code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

STATEMENT

Petitioner, a citizen of the United States, was employed by the Department of the Army as an auditor with the Comptroller Division of the Army, Berlin Command (R. 1). On August 21, 1956, he was tried in Berlin by a duly convened general court-martial on charges of three acts of sodomy committed with military personnel (in violation of Article 125, Uniform Code of Military Justice, 50 U.S.C. 719), of two lewd and lascivious acts with persons under 16 years of age, and of showing obscene pictures to persons under 16 years of age with the intent of arousing

their sexual desires (in violation of Article 134, Uniform Code of Military Justice, 50 U.S.C. 728) (R. 6–7).

At the trial, petitioner was represented by military as well as by independent private counsel (R. 17). After having been advised of his rights by the law officer, petitioner, in open court, pleaded guilty to the charges (R. 24). On the basis of this plea, the court-martial found petitioner guilty of all charges and specifications and sentenced him to confinement at hard labor for a period of ten years (R. 39).

The convening authority approved the findings of guilty but reduced the sentence to five years' confinement (R. 8). The Board of Review affirmed the findings of guilty and the sentence as approved by the convening authority. On review in the Court of Military Appeals, the jurisdiction of petitioner's court-martial was sustained, and the court, after considering the decision of this Court in *Reid* v. *Covert,* 354 U.S. 1, held Article 2(11) of the Uniform Code to be constitutional as applied to the circumstances in this case. 9 U.S.C.M.A. 60, 25 C.M.R. 322 (R. 53–60).

Ultimately, petitioner was confined in the Fitzsimons Army Hospital in Denver, Colorado, where on August 20, 1958, he filed a petition for a writ of habeas corpus in the District Court for the District of Colorado. The court held that petitioner could constitutionally be tried by courts-martial pursuant to the jurisdictional provisions of Article 2(11) (R. 60–72). An appeal was taken to the Court of Ap-

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peals for the Tenth Circuit, but certiorari was allowed prior to argument or decision.

SUMMARY OF ARGUMENT

I

Petitioner was tried and convicted by court-martial of having committed certain non-capital offenses while he was in Berlin as a civilian employee of the Army. Jurisdiction over petitioner was based on Article 2(11) of the Uniform Code of Military Justice. Our first position is that this Article is a proper exercise of Congressional power to make rules for the government and regulation of the military forces, under Article I, Section 8, Clause 14 of the Constitution. The arguments which sustain the constitutionality of Article 2(11) as applied here are fully set forth in our brief in *McElroy* v. *Guagliardo,* No. 21, this Term, which presents the same issue.

II

There is an additional jurisdictional basis for the trial of petitioner by court-martial. He was convicted by a general court-martial of offenses committed in Berlin, Germany, which is territory occupied by the Allied forces as a consequence of World War II. Under Article 18 of the Uniform Code of Military Justice, Congress has provided that persons who by the law of war are subject to trial by military tribunals shall similarly be subject to trial by general court-martial and to punishment in accordance with the laws of war. It is clear that, by virtue of its war powers, Congress can validly provide for

such trial and punishment in territory occupied as a result of war.

There is a long history in the United States of the use of military commissions as an instrument of governmental administration of occupied territories. During hostilities and subsequent occupation periods in the Mexican War, the Civil War, the Spanish–American War, and World War II, military commissions were established under the war power, and such tribunals were uniformly upheld by the federal courts.

This Court recently upheld the validity of a trial of an American citizen by a military court in West Germany during the occupation regime. *Madsen* v. *Kinsella*, 343 U.S. 341. The status of Berlin as an occupied area at the present time is identical with the occupied status of West Germany at the time of the trial and conviction of Mrs. Madsen, and that case accordingly is dispositive of the question here.

ARGUMENT

I.

As applied to petitioner, a civilian employee of the Army tried overseas by court-martial for non-capital offenses, Article 2(11) of the Uniform Code of Military Justice is valid under Article I, Section 8, Clause 14 of the Constitution

Petitioner Wilson, a civilian employee of the Army, was convicted by court-martial of having committed, in Berlin, a non-capital offense against the Uniform Code of Military Justice. As applied to petitioner, the constitutional validity of Article 2(11) of the Uniform Code of Military Justice, under Article 1,

Section 8, Clause 14 of the Constitution, depends on the very same factors and considerations discussed in our brief in *McElroy* v. *Guagliardo,* No. 21, this Term, to which the Court is respectfully referred. The judgment of the District Court denying the petition for writ of habeas corpus should be affirmed for the reasons stated in our *Guagliardo* brief.

II.

Court-martial jurisdiction over petitioner may also be sustained under the Congressional war powers

Alternatively, court-martial jurisdiction in the present case can be sustained under Article 18 of the Uniform Code of Military Justice (*supra,* p. 4)[3] on the basis of the Congressional war powers. Those powers (upon which the District Court did not rely) are relevant here because this case arose and was tried in Berlin, which remains an occupied territory the occupants of which may be tried by court-martial under the law of war and Article 18.

A. Military trials may validly be held in territory under military occupation

In *Madsen* v. *Kinsella,* 343 U.S. 341, the Court was confronted with the case of a civilian dependent, wife of a member of the armed forces, whom a United States Court of the Allied High Commission in Germany convicted of murdering her husband. The offense took place in October, 1949, near Frankfurt, Germany, in what was then the United States Area

[3] "General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."

of Control. After her incarceration in this country, Mrs. Madsen filed a petition for a writ of habeas corpus, challenging the jurisdiction of the court which convicted her, but this Court affirmed judgments of the lower courts which had rejected her contentions.[4]

While it was conceded by the petitioner in *Madsen* that a United States court-martial would have had jurisdiction, challenge was made to the jurisdiction of the special occupation court which tried and convicted her. In discussing the power of that tribunal, this Court laid down the ground rules for the exercise of jurisdiction in occupied territory by military courts under the war powers.[5] The fact of occupation supplies the constitutional basis for the exercise of jurisdiction by special military courts, and, *a fortiori*, by courts-martial, over soldier and civilian alike, within the occupied territory. 343 U.S. at 348. The validity of military jurisdiction is not vitiated by the fact that there may be some form of local government, as long as it is "a government prescribed by an occupying power and * * * [dependent] upon the continu-

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[4] In 1957, after the decisions in *Reid* v. *Covert*, 354 U.S. 1, had been handed down, Mrs. Madsen again petitioned for a writ of habeas corpus, relying on the *Covert* decision. This attempt was not successful. *Madsen* v. *Overholser*, 251 F. 2d 387 (C.A.D.C.), certiorari denied, 356 U.S. 920.

[5] With respect to the problem presented by the instant case, Congress has specifically used its war powers in the enactment of Article 18 of the Uniform Code of Military Justice, 50 U.S.C. 578 (presently 10 U.S.C. 818), *supra*, p. 4. In *Madsen*, the tribunals were established under the authority of the President. Here, Congressional war power is directly involved. These constitutional powers are discussed in *Ex parte Quirin*, 317 U.S. 1, 25–26. See also Winthrop, *Military Law and Precedents*, 831 (Reprint 1920 ed.).

ing military occupancy of the territory" (343 U.S. at 357). The authority for such military trials "does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities fully" (343 U.S. at 360).

In addition to the *Madsen* case, and two other recent decisions by this Court (*Ex parte Quirin,* 317 U.S. 1 (espionage); *In re Yamashita,* 327 U.S. 1 (war crimes)), which sustained the jurisdiction of military commissions as an incident of war and occupation in World War II, this Court has on other occasions upheld the jurisdiction of tribunals established by the United States under the customs and usages of the laws of war. *Leitensdorfer* v. *Webb,* 20 How. 176, sustained the civil jurisdiction of occupation courts set up by General Kearney in New Mexico after the Mexican War. The attack there was upon the validity of certain ordinances of the military government which provided for occupation courts with criminal and civil jurisdiction. The Court stated (20 How. at 178):

> Of the validity of these ordinances of the provisional Government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror. * * * But it has been contended, that whatever may have been the rights of the occupying conqueror *as such,* these were all terminated by the termination of the belligerent attitude of the parties. * * * The fallacy of this pretension is exposed by

> the fact, that the territory never was relinquished by the conqueror, * * *.

During the same period, General Scott convened military commissions for the purpose of trying offenses committed during the occupation of Mexico which were non-military in nature, "whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces, or by such individuals against other such individuals or against Mexicans or civilians * * *." Winthrop, *Military Law and Precedents,* 832 (Reprint 1920 ed.); Birkhimer, *Military Government and Martial Law* (3d ed., 1914), App. I, pp. 581–582 (full text of General Order No. 287 establishing the military commissions).

Military commissions were likewise used extensively during the Civil War, some having been convened as early as 1861. Winthrop, 833. This Court specifically upheld the jurisdiction of provisional courts set up by President Lincoln in Louisiana after that territory had been occupied by the Union armies. *The Grapeshot,* 9 Wall. 129, 131; see also *Burke* v. *Miltenberger,* 19 Wall. 519; 524; *United States* v. *Reiter,* 27 Fed. Cas. No. 16146 (Prov. Ct. La.). Similarly, a court established by an army department commander in New Orleans was held to be validly constituted, in *Mechanics' Bank* v. *Union Bank,* 22 Wall. 276, 296. The Spanish-American War offers additional precedents as to the use of tribunals constituted as an incident of military occupation. See *Neely* v. *Henkel (No. 1),* 180 U.S. 109, 121–123; *Santiago* v. *Nogueras,* 214 U.S. 260, 266; *Ex parte Ortiz,* 100 Fed. 955, 963 (C.C. Minn.).

What these decisions show is that military jurisdiction in occupied territory is one facet of the assumption of governmental powers by the occupying power. The occupation government which creates the conditions for military jurisdiction may be military, or, as it was in Germany when the *Madsen* crime took place, civilian. When such a government is established, it constitutes the supreme authority in the occupied territory (Winthrop, 800):

> Military government, thus founded [on the fact of occupation], is an exercise of sovereignty, and as such dominates the country which is its theatre in all the branches of administration. Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except in so far as the same may be permitted by him to subsist. * * * The local laws and ordinances may be left in force, and in general should be, subject however to their being in whole or in part suspended and others substituted in their stead—in the discretion of the governing authority.[6]

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[6] Military government, the status involved in this case, should be distinguished from martial law. In general, military government involves military control of foreign territories as a consequence of war, whereas martial law concerns itself with the military control of domestic territories in which because of some dire necessity, such as an impending insurrection or rebellion, extraordinary measures need to be employed. As indicated above, military government depends only upon the fact of occupation. See Wiener, *A Practical Manual of Martial*

Local law and civil authority remain within the power and responsibility of the occupying state until that state provides a substitute or until the fact of occupation ceases to exist.

In sum, it is clear that where there is an occupation, there may be an occupation government, and, as part of such a government, there may be military courts with the power to try soldiers and civilians under the law of war.[7] *Madsen* is but a recent,

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Law 7 (1940). It should also be noted that the criminal jurisdiction of the civil courts is much less subject to be abridged under martial law than it is under military government. Winthrop, 830. See, also, *Ex parte Milligan*, 4 Wall. 2, where the Court placed great emphasis on the fact that civil courts were open. When military government is established, civil courts have no authority whatever, except insofar as they are permitted to operate by the occupying power. The military government itself assumes the judicial function or else delegates it to the courts of the occupied territory.

[7] Civil-type offenses, such as those committed by petitioner in this case, are properly triable under the laws of war. Conduct is considered to be a crime cognizable under those laws if it is either specifically punishable under the criminal laws of the occupied state or recognized generally by civilized nations as a crime against society: *United States* v. *Schultz*, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (homicide by negligent operation of a motor-vehicle); see also, Birkhimer, *op. cit.*, 581–582; and Winthrop, 773. The practice of modern warfare has recognized the right of the occupying power to set up its own military courts and to alter local criminal law and procedure (though it should, if possible, leave in force local criminal laws and rule the people of the occupied nation through their own laws and rules of administration). 2 Oppenheim, *International Law*, §§ 169, 172 (7th ed., 1952); Spaight, *War Rights on Land*, 356 (1911); Graber, *The Development of the Law of Belligerent Occupation 1863–1914*, 110 (1949). These principles were codified in Article 64 of the Geneva Convention, T.I.A.S.

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though cogent, example of the use of military courts as an incident of occupation. See the opinion of Mr. Justice Black in *Reid* v. *Covert*, 354 U.S. 1, 35, fn. 63.

B. Berlin continues under military occupation

As we have just shown (*supra*, pp. 8–14), petitioner's trial must be held to be valid under Article 18 of the Uniform Code if Berlin was occupied territory in 1956. Our position is that the status of West Berlin, in 1956 and today, is identical with the status of West Germany as occupied territory as of the time of the events in *Madsen* v. *Kinsella*. Berlin is under military occupation, both technically and realistically; our right there are rights of occupation. One need only peruse the daily newspapers to become aware of the fact, the necessity, and the reasonableness of the continuation of this status of occupation. See the *Note from the United States to the Soviet Union on Berlin, December 31, 1958* (Documents on Germany, 1944–1959, Committee Print, Senate Committee on Foreign Relations, 86th Cong., 1st Sess., p. 347), which explains our position on Berlin. In the view of the United States, the three Western powers are there as "occupying powers" and are not prepared to relinquish, on the terms of the Soviet Union, the

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3365. The occupying powers have uniformly tried their own nationals in their own military courts rather than permit them to be tried in the local tribunals. See, for example, Fraenkel, *Military Occupation and the Rule of Law*, 22, 150 (1944), with respect to the practice during the Rhineland occupation after World War I.

rights they acquired through the victory in World War II.[8]

1. This Court fully discussed the history of the occupied status of Germany in the *Madsen* case (decided in April 1952). Accordingly, it need not be re-examined here in detail. The important issue is whether subsequent events have in any way changed the status of Berlin since the decision in *Madsen*.

Briefly, after the defeat of the Axis powers in Europe in 1945, the Supreme Commanders of the various Allied Powers issued a declaration assuming supreme authority with respect to Germany, including "all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority." 12 Dept. of State Bull. 1051. Whatever authority Germany regained after this assumption of supreme authority depended upon the agreement and consent of the occupying powers.

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[8] The United States has consistently taken the position that the Berlin occupation status cannot be unilaterally changed by any of the four occupying powers, including the Soviet Union. This country committed itself to a specific agreement with the United Kingdom and France that the rights of the occupying powers would continue to be exercised in Berlin notwithstanding the termination of the occupation regime in West Germany. *Tripartite Agreement on the Exercise of Retained Rights in Germany*, T.I.A.S. 3427 (par. 3). For a full statement of the position of the United States on Berlin, see *The Soviet Note on Berlin: An Analysis*, State Dept. Pub. 6757 (1959). This publication explains in detail the history of the status of Berlin after World War II as well as the texts of various replies to Soviet proposals on Berlin. Without exception, this country has bottomed its right to be in Berlin on the continued existence of the occupation. See the *Statement by the Department of State on Legal Aspects of the Berlin Situation, December 20, 1958* (Documents on Germany, 1944–1959, *supra*, p. 336).

The policy of the Government of the United States has been to place Germany on an economically self-sustaining basis and to permit the German people to govern themselves. In implementation of this policy, the Western military governors approved the so-called Bonn Constitution which was to form the Basic Law of the Federal Republic of Germany. One paragraph of the letter of approval submitted by the military governors of the western zones of Germany to Chancellor Adenauer is particularly pertinent to the problem of Berlin. Two Articles of the Basic Law purported to include Berlin as a Land within the Federal Republic. Article 23 provided that the Basic Law applied to Berlin; and Article 144(2) in effect stated that if, because of some restriction the Basic Law could not apply in Berlin, that city could still send representatives to the Bundestag and the Bundesrat. The military governors suspended the effect of these two Articles as they applied to Berlin. *Germany 1947–1949, The Story in Documents*, 279, State Dept. Pub. 3556 (1950) (Letter of May 12, 1949).[9] This reservation as to the exercise of sovereignty by the Federal Republic of Germany in Berlin has never been repealed or altered in any manner whatever. On the contrary, in 1952, during

[9] "A third reservation concerns the participation of Greater Berlin in the Federation. We interpret the effect of Articles 23 and 144(2) of the Basic Law as constituting acceptance of our previous request that while Berlin may not be accorded voting membership in the Bundestag or Bundesrat nor be governed by the Federation she may, nevertheless, designate a small number of representatives to attend the meetings of those legislative bodies."

negotiations which culminated in the formulation of the Bonn Conventions,[10] the Allied High Commissioners (who had replaced the Military Governors) in a letter to Chancellor Adenauer reiterated the reservations made earlier by the military governors as to the application of certain portions of the Basic Law of the Federal Republic. T.I.A.S. 3425, p. 1352. And the Bonn Conventions themselves contained specific reservations with respect to the rights of the three powers in Berlin (Article 2, *Convention on Relations*, T.I.A.S. 3425, p. 1484):

> In view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a

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[10] The Bonn Conventions were ultimately adopted with certain amendments by the so-called Paris Protocol and became effective on May 5, 1955. *Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany*, T.I.A.S. 3425. The specific Conventions, as amended (*Convention on Relations between the Three Powers and the Federal Republic of Germany; Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany; Finance Convention; Convention on the Settlement of Matters Arising out of the War and the Occupation; Agreement on the Tax Treatment of the Forces and their Members*) are found in composite form in T.I.A.S. 3425, pp. 1483–1571. As submitted to the United States Senate these Conventions are found in S. Doc. 11, 84th Cong., 1st Sess. The coming into effect of these agreements ended the military occupation of West Germany, and the Federal Republic emerged as an independent sovereign state, subject only to the exercise of the rights of the three powers with respect to Berlin and to Germany as a whole. See above, p. 17 *ff.*

whole, including the reunification of Germany and a peace settlement. * * *

When Secretary of State Dulles forwarded the various agreements to the President for submission to the Senate for approval he specifically stated that the arrangements for the termination of the occupation regime in the Federal Republic did not affect the status of Berlin. 31 Dept. of State Bull. 852.

The German Federal Constitutional Court itself asserts that the Federal Republic exercises no direct sovereign powers in West Berlin. In a recent case a Berlin court submitted to the Federal Constitutional Court a question concerning the constitutionality of a West Berlin statute. The Constitutional Court held that it had no jurisdiction to rule on the question, because the reservation of the three powers which prevented the application of the Basic Law in Berlin also prevented the Constitutional Court from taking jurisdiction over questions arising in Berlin.[11] The court so held even though the Berlin legislature purported to adopt a statute of the Federal Republic which had conferred jurisdiction on the Constitutional Court. It noted that the Allied Kommandatura in Berlin had protested the adoption of the statute because it violated the policy of the three powers. The court concluded that the reservation precluded its

[11] The court did not follow the view of the Allied High Commission that Berlin was not a Land of the Federal Republic. However, it held that the Basic Law of the Federal Republic was effective in Berlin only insofar as it was not restricted by reservations of the three powers.

exercise of jurisdiction in Berlin.[12] 10 Neue Juristische Wochenschrift 1273 (No. 35, 1957); 52 Am. Jour. Int'l Law 358–360.

The United States has maintained its policy of separate treatment of Berlin throughout the post-war period. Although the three Western powers were hopeful that the policies established for the Federal Republic could be extended to Berlin in order to insure its economic growth, outright inclusion of Berlin within the Federal Republic has not been deemed feasible. West Berlin, its status, and our control, have been unaffected by our agreements with the Federal Republic of Germany.

2. The situation with respect to the local government of Berlin did not develop as did that of the Federal Republic. Although as far as possible the Allied powers placed the local government into the hands of the people of Berlin, the status of the city as an occupied territory remains unchanged. The Allied Kommandatura, the agency which administers and has administered Berlin since its occupation, is the governing body of that city. This body was not dissolved, as was the Allied High Commission with the emergence of the Federal Republic.[13]

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[12] Other courts of the Federal Republic whose jurisdiction does not involve the right to pass on Berlin statutes have been permitted to exercise appellate jurisdiction in cases arising in the Berlin courts. *Berlin: Allied Rights and Responsibilities in the Divided City*, 6 Int'l and Comp. L.Q. 82, 93.

[13] The Agreement on the Control Machinery in Germany on November 14, 1944, as amended May 1, 1945, established quadripartite governing authority for the city. The Soviet Union left the Kommandatura in 1948 and since that time the Western sectors of Berlin have been governed by the remain-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 21

NEIL H. MCELROY, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, EX REL. DOMINIC GUAGLIARDO

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT

STATUTES INVOLVED

The provision of the Uniform Code of Military Justice, as codified in 70A Stat. 37, 10 U.S.C. § 802, provides:

§ 802. Art. 2. Persons subject to this chapter

The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the Coast and Geodetic Survey, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands. Aug. 10, 1956, c. 1041, 70A Stat. 37.

SUMMARY OF ARGUMENT

I.

In *Reid* v. *Covert*, 354 U.S. 1, this Court held Subparagraph 11 of Article 2 of the Uniform Code of Military Justice, 10 U.S.C. §802(11), to be unconstitutional insofar as it authorized peacetime court martial jurisdiction over civilian dependents when charged with a capital offense. Having held Subparagraph 11 to be unconstitutional in part, it is unnecessary for this Court to consider the constitutionality of the remaining portion of the subparagraph because under well established principles of statutory construction, the two portions are not severable. Subparagraph 11 is plain and unambiguous. There is no room for construction except as to the constitutionality. Under the doctrine of *United States* v. *Reese*, 92 U.S. 214, 221, separation cannot be made because it would involve inserting words of limitation where there are none and involve legislation by the judiciary.

Further, it is not possible to say whether Congress would want the subparagraph severed or how it should be accomplished. The decision in *Reid* v. *Covert* removed 95% of those persons made subject to the Code by Subparagraph 11, when charged with the most serious offenses. It would seem that Congress would have sought another remedy than the one provided in Subparagraph 11, in view of the unconstitutional portion. This view is fortified by the obvious Congressional purpose to treat all civilians uniformly which objective could not be fulfilled by making the subparagraph separable. The policy considerations involved in validly redrafting Subparagraph 11 further indicate the wisdom of this Court's refraining from the attempt to redraft Subparagraph 11.

II.

The power of Congress in Article I, Section 8, Clause 14 to make rules for the government and regulation of the

land and naval forces does not authorize peacetime court martial of civilian employees. No support for the asserted jurisdiction is found in the Constitutional Convention. Indeed, when the strong anti-militarist feeling of the Convention is considered, the absence of any comment on Clause 14 indicates that the Founding Fathers did not intend by Clause 14 to authorize peacetime court martial of civilians. Throughout the 19th century, it was uniformly held by Attorneys General, Judge Advocates General, and recognized textwriters that civilians were not subject to court martial in time of peace. These rulings were made in published official reports. The episodic evidence to the contrary advanced by petitioners indicates the weakness of attempting to find historical support for their position.

Further, the principles enunciated by this Court in other cases involving extension of military jurisdiction at the expense of trial by jury are persuasive that peacetime court martial power over civilians is unconstitutional. Whenever an attempt has been made to enlarge military jurisdiction at the expense of trial by jury, that attempt has failed. *Ex Parte Milligan*, 4 Wall. 2; *Duncan* v. *Kahanamoku*, 327 U.S. 304; *Toth* v. *Quarles*, 350 U.S. 11; *Reid* v. *Covert*, 354 U.S. 1.

III.

Respondent's "connection with" the armed forces is not such that he should thereby be made subject to court martial jurisdiction in time of peace. Although employed by the armed forces, respondent remained a civilian. He lived as a civilian. His employment was as a civilian. He was free to quit at any time. Respondent's status should be contrasted with an airman. An airman enlisted and was bound to serve the term of his enlistment. On enlisting, he swore to obey the orders of the President and orders of officers appointed over him.

The most important distinction between a civilian employee of the Air Force and an airman is that the airman

is continually under restraint by his Commanding Officer. He cannot come and go as he pleases, cannot quit, and must obey the orders given him. A civilian employee is free to come and go as he chooses, may quit, and can only be given orders about his work. An airman overseas with the Air Force is there primarily to fight and to prepare to fight. Respondent was in Morocco simply to work at his trade.

Respondent's relation to the Air Force is transient, part time, and terminable at any time by either party. He is no more a "part" of the Air Force than any secretary in the Pentagon and his relation to the Air Force does not justify its having peacetime court martial jurisdiction over him.

IV.

Peacetime court martial jurisdiction over civilian employees is not "necessary and proper" for the "regulation and government of the land and naval forces". The asserted power is not "proper" because it conflicts with specific guarantees in the Bill of Rights—trial by jury after indictment by a grand jury. Although the enumerated powers are often expanded by virtue of the necessary and proper clause, no prior decision of this Court has ever expanded an enumerated power at the expense of a specific guarantee in the Bill of Rights.

In any event, the asserted power of court martial of civilian employees in time of peace is not necessary to the function of the armed forces abroad. This is indicated by the reasons given by various military commanders for the necessity of court martial power. The most pressing reasons given (and those involving the most numerous cases) are to prevent black market operations and to prevent traffic violations. These are obviously functions of the host country and violations of the host country's laws. Clearly they do not justify peacetime court martial jurisdiction over civilians. Other reasons, such as, prevention of disclosure of classified information, are not persuasive. The

offense is rare and is already a violation of the Criminal Code, 18 U.S.C. §§ 792-797, and could be prosecuted in the United States even though committed abroad, Cf. 18 U.S.C. § 791.

In addition to United States citizens employed abroad by the Defense Department, there are over 200,000 other persons who work for the armed forces abroad. These foreign nationals have jobs which are in many cases identical to those of United States citizens. All have access to the overseas bases and are as much a "part" of our armed forces abroad as is respondent. Yet there is no court martial power over these civilians and none has ever been sought.

Further, there are some 60,000 American citizens employed abroad by other departments of the United States Government. These departments are able to carry out their programs without the power of court martial. When these Americans commit a crime, they, like other Americans employed or traveling abroad, are subject to trial in the foreign country's courts. No valid reason has been advanced for differentiating between United States citizens employed by the Defense Department abroad and these other employees and other Americans abroad. It would be more consonant with our tradition to have civilians tried by civilian courts, even though foreign civilian courts, than to subject some American civilians to trial by military courts martial in time of peace.

Even if necessity could authorize the peacetime expansion of court martial power to encompass civilians, petitioners' reasons fall far short of establishing the requisite necessity.

ARGUMENT

I. THE PORTION OF SUBPARAGRAPH 11 OF ARTICLE 2 OF THE UNIFORM CODE OF MILITARY JUSTICE WHICH WAS DECLARED UNCONSTITUTIONAL IN REID v. COVERT IS NOT SEPARABLE FROM THE REMAINDER OF THE SUBPARAGRAPH.

A. The Provision Is Plain, Unambiguous and Leaves No Room for Construction, Except as to the Effect of the Constitution.

Article 2 of the Uniform Code of Military Justice, 10 U.S.C. § 802, enumerates in 12 subparagraphs the various classifications of persons subject to the Code (supra, pg. 1). Subparagraph 11, under which respondent was prosecuted, makes subject to the Code:

> "... persons serving with, employed by, or accompanying the armed forces outside the United States ...".

In *Reid v. Covert*, 354 U.S. 1, this Court held Subparagraph 11 to be unconstitutional at least insofar as it applied to a person accompanying the armed forces charged with a capital offense. That case, and its companion, *Kinsella v. Krueger*, involved a civilian dependent charged with murdering her husband, a member of the Armed Forces. One case occurred in Japan, the other in Germany. This Court held that both courts martial were unconstitutional. The principal opinion by Mr. Justice Black was concurred in by the Chief Justice, Mr. Justice Douglas and Mr. Justice Brennan. Mr. Justice Black, while recognizing "that there might be circumstances where a person could be 'in' the armed forces for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform" (354 U.S. at 22-23), stated that:

> "We agree with Colonel Winthrop, an expert on military jurisdiction, who declared: '*A statute cannot be*

framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."
354 U.S. at 35
(Emphasis not supplied)

Mr. Justice Frankfurter and Mr. Justice Harlan, in their concurring opinions, agreed that the peacetime court martial of dependents charged with capital offenses was unconstitutional, but limited their decision to that factual situation.

Having held Subparagraph 11 to be unconstitutional in part, it is unnecessary for this Court to consider the constitutionality of the remaining portion of Subparagraph 11 because, under well established principles of statutory construction, the remaining portions of Subparagraph 11 cannot be separated from the already declared unconstitutional portion.

Subparagraph 11 is not severable because it is a plain and unambiguous single penal section, general in application. To introduce a limitation requires legislation from which courts are barred under the separation of powers doctrine. Severance would also probably be contrary to the Congressional intent.

The constitutional inquiry in the instant case is made unnecessary by the rule of construction applied in *United States v. Reese*, 92 U.S. 214, 221 and other decisions.[1] In that case, this Court was:

> "directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this

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[1] *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 522; *Butts v. Merchants & M. Trans. Co.*, 230 U.S. 126, 133; *Illinois C.R. Co. v. McKendree*, 203 U.S. 514, 529; *James v. Bowman*, 192 U.S. 127, 140; *Baldwin v. Franks*, 120 U.S. 678, 686; *Virginia Coupon Cases*, 114 U.S. 270, 305; *United States v. Harris* 106 U.S. 629, 642; *The Trademark Cases*, 100 U.S. 82, 99.

purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there now. Each of the sections must stand as whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would to some extent, substitute the judicial for the legislative department of the government." 92 U.S. at 221.

The rule of the *Reese* case is fully applicable to the case at bar. Subparagraph 11 cannot be made severable merely by striking out or disregarding words. To sever the already declared unconstitutional portion from the remainder of Subparagraph 11 requires inserting words of limitation where there are now none in the provision. It will require inserting after the word "accompanying" the words "except in capital offenses". It cannot be denied that Subparagraph 11 is plain and unambiguous in its meaning. There is no room for construction except as to the effect of the Constitution. Thus the rule of the *Reese* case forbids such construction because to do so would be to violate the separation of powers and require this Court to legislate.

B. There Is No Solid Evidence That Congress Intended the Provision to Be Separable and No Indication of How the Separation Should Be Accomplished.

When the Uniform Code of Military Justice was enacted, it contained the following separability clause:

"If any article or part thereof, as set out in section 1 of this Act shall be held invalid, the remainder shall not be affected thereby." *Act of May 5, 1950*, c. 169, Sec. 2.

Senate Report 486 (81st Cong., 2nd Sess.), which accompanied the legislation, states that the foregoing:

"is a savings provision which will preserve the validity of all the remaining articles of this act in the event any article or part thereof should be declared invalid." *1950 Cong. Code Serv.*, p. 2261.

In 1956, Congress codified Title 10, including therein the Uniform Code of Military Justice. The separability clause which petitioners quote (Pet. Br. p. 22) is from the 1956 codification. However, Section 49 of the enabling act states that:

"it is the legislative purpose to restate, without substantive change, the law replaced by those sections [1-48] on the effective date of this Act." *Act of Aug. 10, 1956*, c. 1041, Sec. 49.

Hence it would seem that the separability clause to be considered is that contained in the 1950 Act, quoted above.

The separability provision does not alter essentially the problem. By enacting a separability provision, Congress:

"did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court." *Hill v. Wallace*, 259 U.S. 44, 70.

The separability clause merely creates a presumption that the legislature intended the act to be divisible, in contrast to the situation without a separability provision in which the presumption is that the act must stand as an entirety. *Williams v. Standard Oil Co.*, 278 U.S. 235, 241-242 (1928). The separability clause does not change the essential inquiry before this Court. As was said in *Carter v. Carter Coal Co.*, 298 U.S. 238, 312:

> ". . . Under either rule, the determination, in the end, is reached by applying the same test—namely, What was the intent of the lawmakers?"

Before discussing the intent of Congress, it is well to note parenthetically just what is involved herein. This Court is not being asked to declare the Uniform Code of Military Justice unconstitutional. What is involved is merely one subparagraph of one section of a code comprising 140 various articles. The subparagraph involved is one of 12 classifications of persons subject to the Act (supra, p. 1). Obviously, a determination by this Court that subparagraph 11 is invalid because of the admittedly unconstitutional portion would not disturb the remaining 11 categories of persons subject to the Act or invalidate any of the other 139 articles of the Code. The limited nature of the issue in this regard is important because most of the other cases involving separability involve the entire statutory scheme enacted by the legislature. Cf *Williams v. Standard Oil Co.*, supra; *Carter v. Carter Coal Co.*, supra.

The separability provision was included to avoid the *entire* Code from being held invalid, rather than each article or subparagraph thereof. This is demonstrated by Senate Report 486, supra, which says the provision "will preserve the validity of all the remaining articles of this act in the event any article or part thereof should be declared invalid."

When the Congressional intent is considered, it is apparent that the possibly valid portion of subparagraph 11 may not be separated from the admittedly invalid portion. There is no solid evidence that Congress would have so intended. Further, as Judge Fahy pointed out in the court below:

> "We do not know how to sub-divide this provision as Congress might have done if Congress had known it could not be upheld as written." (R. 41)

The majority below held that subparagraph 11:

> "is nonseverable into fragments which have not been specified by Congress or as to which Congress has not

furnished criteria for a case-by-case judicial application." (R. 41)

1. The admittedly unconstitutional portion of subparagraph 11 applies to the vast majority of what the Government characterizes as the "civilian contingent" and applies when charged with the more serious offenses. Of the 480,000 United States citizen civilian employees and civilian dependents located in foreign countries as of March 31, 1959, only 25,000 are civilian employees (Pet. Br., App. pp. 110-111). The remaining 455,000 are dependents as to whom the *Covert* case in terms applies when they are charged with a capital offense. Ninety-five per cent of those covered by subparagraph 11 are thus excluded by virtue of the decision in *Reid v. Covert*. To sever the remaining portion of subparagraph 11, it is necessary to assume that Congress would have passed the same statute even though 95% of those it intended to cover were constitutionally excluded. Merely to state the assumption is to demonstrate that it is unwarranted. Common sense tells us that had Congress known that 95% of those it sought to cover by subparagraph 11 would be constitutionally excluded (when charged with the most serious crimes), it would have sought another remedy than the one set forth in the Code.

2. In enacting the Uniform Code of Military Justice, Congress obviously intended to treat alike all civilians which it made subject thereto. This is borne out by the statute itself and confirmed by petitioner's argument in the case at bar and in *Reid v. Covert*. This objective of uniform treatment would obviously be frustrated by severing subparagraph 11. It would seem more consonant with the Congressional objective of uniformity to hold the entire subparagraph 11 invalid. Faced with the impossibility of treating all civilians uniformly and subjecting them to general courts martial, it is more likely that Congress would have sought a different solution than subjecting some civilians to court martial while excluding others. Congress would

have to make some provision for the situation of dependents (whether by some other type of United States jurisdiction or by leaving jurisdiction where it was originally—in the foreign state) and it would seem most probable that Congress would have included civilian employees in whatever solution it decided upon for civilian dependents. In any event, the very necessity for speculating on the Congressional intent forcefully demonstrates and confirms the indivisible nature of the section as written.

3. The legislative history of the predecessor to present Article 2(11) of the Uniform Code of Military Justice makes clear that Congress was never advised and did not consider that any constitutional question was involved in extending court martial jurisdiction to civilians in time of peace.

When confronted with the constitutional problem, Congress, if it decided the power was needed, might well limit its use (1) to crimes which have an intimate relation to the *function* of the armed forces abroad, and/or (2) to areas in which there was not adequate civil authority to maintain law and order. The crime of sodomy (See *Wilson v. Bohlender,* O. T. 1959, No. 37), has no direct relation to the Army's function in Berlin. Similarly, the problem posed by a civilian employed by the armed forces in England is completely dissimilar to the problem raised by the commission of a crime by a civilian in an isolated island outpost in the Pacific. (See Supplemental Brief for Appellant and Petitioner, *Reid v. Covert,* Nos. 701 and 713, O.T. 1955, pp. 115-116).

The foregoing possible limitations are suggestive of policy considerations implicit in validity redrafting Subparagraph 11 so as to be constitutional. They indicate the wisdom of this Court's refraining from attempting to separate the already declared unconstitutional portion of Subparagraph 11 from the remainder.

II. THE CONGRESSIONAL POWER TO MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE LAND AND NAVAL FORCES DOES NOT AUTHORIZE THE COURT-MARTIAL OF CIVILIAN EMPLOYEES IN TIME OF PEACE.

A. At the Time of the Revolutionary War, Trial of Civilians by General Court Martial Was Restricted to "In the Field" and in Time of War.

Before adverting to the practice at the time of the Revolutionary War, it should be noted that the case at bar presents a question of Constitutional guarantees whose resolution cannot be settled by the practice at the time of the Revolution. This is because it is respondent's contention that he may not be subjected to General Court Martial in time of peace even though there would be authority to try him by General Court Martial in time of war. Thus the practice during the Revolutionary *War* is of little assistance in determining what the practice was in time of peace.

The pertinent provision of the Articles of War adopted by the Continental Congress on June 30, 1775, provides:

> "All suttlers and retailers to a camp, and all persons whatsoever serving with the Continental Army in the field, though not enlisted soldiers, are to be subject to the Articles, Rules, and Regulations of the Continental Army." (*Journals of the Continental Congress*, Vol. 2, 1775, pg. 116.)

An almost identical provision is found in Sec. 13, Article 23, of the Articles of War adopted by the Continental Congress on September 20, 1776 (id. Vol. 5, 1776, pg. 800).

Although the foregoing provision may appear to be quite broad, it and subsequent reenactments have been uniformly interpreted to apply only in time of war in the field. They have been held to be inapplicable in time of war not in the field and wholly inapplicable in time of peace anywhere. See, for the views of the Attorney General to this effect, 14 Ops. Atty. Gen. 22; 16 Ops. Atty. Gen. 13 and 48; for those of the Judge Advocate General of the Army, Dig. Op. JAG

(1912), pp. 151-152, ¶¶LXII A to LXIII D; id. (1901), pp. 56-58, 563; ¶¶161-168; id. (1895), pp. 75-77, ¶¶1-8, 323, 326, 599, 600; id. (1880), pp. 48-49, 211, 384, ¶¶1-8; and for those of recognized text-writers, Winthrop, *Military Law and Precedents*, (2d Ed, Reprint 1920) pp. 97-102; Davis, *Military Law* (3d Ed., 1915), pp. 52-53, 478-479; Dudley, *Military Law and the Procedures of Courts-Martial* (2d Ed. 1908), pp. 413-414.

B. Absence of Any Mention of Court Martial Power over Civilians Coupled with the Strong Anti-Militarist Feeling at the Constitutional Convention Impels the Conclusion that the Founding Fathers Did Not Intend the Constitution to Permit Court Martial of Civilians in Time of Peace.

The authority granted Congress in Article 1, Section 8, Clause 14 "to make rules for the government of the land and naval forces" was not discussed during the Constitutional Convention. The clause was included in the final draft of the Constitution without either discussion or debate. Neither the original draft presented to the Convention nor the draft submitted by the "Committee on Detail" contained the clause. 5 Elliot's Debates, 130, 379.

The language of Clause 14 was taken from Article IX of the Articles of Confederation which gave Congress "the sole and exclusive right and power" of "making rules for the government and regulation of the said land and naval forces, and directing their operations". Under the Articles, the Army consisted of the militia called into the service, and a large measure of control over the militia rested in the States. It would appear that the reason for Clause 14 being in the Constitution was not to make any specific grant of powers (which power would seem to be incidental to the powers in Clauses 12 and 13 "to raise and support armies" and "to provide and maintain a Navy") but rather to show that *Congress* had the power, not the President in his function as Commander in Chief.

If the power authorized by Clause 14 were intended to include the sweeping power of trying civilians by General Court Martial in time of peace, it is inconceivable that some member of the Constitutional Convention would not have raised the point in debate. It must be remembered that distrust and hatred of military rule was one of the hallmarks of our Revolution. One of the complaints lodged against George II in the Declaration of Independence was that "He has affected to render the Military independent of and superior to the Civil Power".

In the Constitutional Convention, Gerry attempted to limit the standing army to two or three thousand men. Warren, *The Making of the Constitution,* 482-484. A number of States proposed declarations of rights asserting that standing armies in time of peace were dangerous to liberty (1 *Elliot's Debates,* 355; 3 id. 660; 4 id. 244). The history related by Justice Black in *Reid v. Covert,* at 354 U.S. 28-30, led him to conclude that:

> "...the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval Forces'."
> (Id., 30)

It is inconceivable that a Constitutional Convention that was very reluctant to authorize even a standing army in time of peace would grant without comment authority to try civilians by court martial in time of peace.

C. The Published, Consistent Rulings of the Judge Advocates General and the Absence of Usage after the Revolutionary War Are Further Indication of the Military's Lack of Power to Try Civilians in Time of Peace.

During the 19th century, the authority to subject civilians to military courts martial was rigorously restricted to time of war, and even during time of war, in the area of the

conflict. It is a tribute to the American military that during this period they never sought to enlarge the area of military jurisdiction.

The leading authority on military law is Colonel Winthrop, who has been described as the "Blackstone of American military law." His famous treatise "Military Law and Precedents" (2d Ed. 1896) was reprinted in 1920 by the Army for use of Judge Advocate General officers. One section of his treatise is entitled "General Principle of Non-Amenability of Civilians to the Military Jurisdiction in Time of Peace." Therein he wrote:

> "That a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law";

and, after a lengthy discussion of the "Constitutionality of the Statutes" to the contrary, notably AW 60 of 1874, he concluded with the italicized observation (Reprint, p. 107) that:

> "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"

Other military writers of the period, such as Gen. Davis, a former Judge Advocate General, and Col. Dudley, Professor of Law at West Point, expressed views identical to Col. Winthrop. Davis, *A Treatise on the Military Law of the United States* (3rd ed. 1915) 52-53, 478-479; Dudley, *Military Law and the Procedure of Courts-Martial* (2d ed, 1908) 413-414.

The printed opinions of the Judge Advocates General of the Army reflect the same view as seen from the following paragraphs contained in the 1912 *Digest of Opinions of the Judge Advocates General of the Army:*

> "VIII G 2 a. (p. 513) By the sixth amendment of the Constitution, civilians are guaranteed the right of trial by jury 'in all criminal prosecutions'. Thus—in

time of peace—a court-martial can not assume jurisdiction of an offense committed by a civilian without a violation of the Constitution. It is only under the exceptional circumstances of a time of war that civilians may, in certain situations, become amenable to trial by court-martial." (Citing rulings from 1866, 1867 and 1905)

"VIII G 2 a(1). (p. 513) *Held* that any statute which attempts to give jurisdiction over civilians, in time of peace, to military courts is unconstitutional." (citing rulings from 1879, 1905 and 1906)

"LXIII B. (p. 151) The jurisdiction authorized by this article (AW 63 of 1874) can not be extended to civilians employed in connection with the Army in time of peace (citing 16 Op. Att'y Gen. 13 and 48), nor to civilians employed in such conection during the period of an Indian war, but not on the theater of such war." (citing a ruling from 1877, with related rulings from 1877, 1903 and 1909)

Not only were the boundaries of military jurisdiction limited to time of war and in the field, but the rulings of the Judge Advocates General of the Army reflect a zealous regard to stay within these boundaries. For example, during the many undeclared Indian Wars of the last half of the 19th century, it was ruled that court martial jurisdiction could not be extended "to civilians employed in such connection during the period of an Indian war, but not on the theater of such war." (Dig. Op. J.A.G., 1912, p. 151; ¶LXIII B; id., 1901, p. 57; ¶165, id., 1895, p. 76, ¶5; id., 1880, pg. 49, ¶5). And it was likewise ruled, in 1877 and again in 1903 and 1909, that:

> "In view of the limited theater of Indian wars, this exceptional jurisdiction is to be extended on civilians, on account of offenses committed during such wars, with even greater caution than in a general war."

(Dig. Op. J.A.G., 1912, p. 151, LXIII B; id., 1901, p. 57, ¶165; id., 1895, p. 76, ¶5; id., 1880, p. 49, ¶5), *Accord*, Winthrop, supra (reprint), p. 101.

This limited jurisdiction over civilians was held not to

survive the end of a war, whether general or against the Indians.

> "The jurisdiction, to be lawfully exercised, must be exercised *during* the status belli."

Dig. Op. J.A.G., 1912, p. 151, ¶LXIII B 1; id., 1901, p. 57, ¶166; id., 1895, p. 76, ¶6; id., 1880, p. 49, ¶6; Winthrop, supra (reprint), p. 102.

A close historical analogy to respondent is found in the Post Trader of the 19th century. The Post Trader was the successor to the suttler and was succeeded near the end of the 19th century by the Post Canteen and Post Exchange. The statutes authorizing Post Traders (Joint Resolution of March 30, 1867, No. 33, 15 Stat. 29, and Sec. 22 of the Act of July 15, 1870 c. 294, 16 Stat. 315, 319-320 (later R.S. § 1112)), provided "That such traders shall be under protection and military control as camp followers." Sec. 3 of the Act of July 24, 1876, c. 226, 19 Stat. 97, 100, provided that every Post Trader "shall be subject in all respects to the rules and regulations for the government of the Army." It will be seen that these provisions are almost identical with the Articles of War at the time of the Revolution. Despite the broad language in the foregoing, the Judge Advocates General of the Army held that military jurisdiction over Post Traders was limited to time of war (Dig. Op. J.A.G., 1901, p. 563, ¶2023; id., 1895, pp. 599-600, ¶4; id., 1880, p. 384, ¶4):

> "A post trader is not, under the Act of 1876, and was not under that of 1867 or 1870, amenable to the jurisdiction of a military court in time of peace. The earlier statutes assimilated him to a camp-follower, but, strictly and properly, there can be no such thing as a camp follower in time of peace, and the only military jurisdiction to which a camp follower may become subject is that indicated by the 63rd Article of War, viz. one exercisable only 'in the field' or on the theatre of war. Nor can the Act of 1876, in providing that post traders shall be 'subject to the rules and regulations for the government of the army', render them amenable to trial by

court martial in time of peace. * * * If * * * the Articles of War are intended to be included, the amenability imposed is simply that fixed by the particular Article applicable to civilians employed in connection with the Army, viz. Art. 63, which attaches this amenability only in time of war and in the field. Thus, though post traders might perhaps become liable to trial by court martial if employed on the theatre of an Indian war, as persons serving with an Army in the field in the sense of that Article, they cannot be made liable when not thus situated * * *."

D. The Historical Practice Urged by Petitioners Consists of Cases Involving the War Powers or Unpublished Material Which Is at Variance with the Published Views of the Responsible Government Officers.

Petitioners contend that the Congressional power to provide court martial jurisdiction over non-uniformed or "civilian" persons has been tested and upheld in the Federal courts (Pet. Br. 61). They contend that these decisions demonstrate that under certain circumstances at least civilian employees of the armed forces can be included within the term "land and naval forces" of Article I, Sec. 8, Clause 14. The cases do not support the contention.

First, nearly all the cases cited by the Government involve wartime situations upholding jurisdiction to court martial under the war powers clause not under clause 14.

Second, the Government urges that the cases holding that civilian paymaster clerks were in military service for court martial purposes but neglects to mention the vital difference between a paymaster clerk and an ordinary employee in the Defense Department such as respondent.

In *Ex parte Reed*, 100 U.S. 13, this Court said:

> "The place of paymaster's clerk is an important one in the machinery of the navy. Their appointment must be approved by the commander of the ship. Their acceptance and agreement to submit to the laws and regulations for the government and discipline of the navy must be in writing, and filed in the department.

> They must take an oath and bind themselves to serve until discharged. The discharge must be by the appointing power, and approved in the same manner as the appointment. They are required to wear the uniform of the service; they have a fixed rank; they are upon the pay-roll, and are paid accordingly. They may also be entitled to a pension and to bounty land. . . .
>
> If these officers are not in the naval service, it may well be asked, who are."

The contrast between the paymaster's clerk and respondent is strikingly apparent. Respondent was employed by the civilian personnel office of the Nouasseur Air Base, not by the Commanding Officer. He took the same oath as is required of all Civil Service employees. He made no commitment which would bind him to serve until discharge. He wore no uniform. He had no rank. He was not entitled to a pension except as might be provided to all Civil Service employees. (See, *infra* p. 26 et seq.)

The expertise of the Court of Claims in this field must be conceded and it had no difficulty in holding that services of an employee of the Army was not time of service in computing longevity pay. After referring to *United States v. Hendee*, 124 U.S. 309, and the provision above quoted from *Ex parte Reed*, supra, said:

> "It cannot be justly claimed that everyone who has employment under the government in immediate connection with the Army belongs to or is serving in the Army. Such persons are mere civilians and are in no sense a part of the Army any more than any other class of clerks in the classified service of the government."
>
> *Schreiner v. U.S.*, 43 C.Cls. 480, 483.

The weakness of petitioners' contention of an historical basis for the asserted peacetime court martial power over respondent is manifested in the sources of the supporting authorities cited (Pet. Brief, pg. 56). Petitioners rely primarily upon unpublished decisions of the Judge Advocates General and unpublished reports of court martial cases available only in the National Archives. From the display

of authority, one would imagine the subject under consideration was shrouded in the mists of antiquity about which no books had ever been written. The contrary, of course, is true. There are published digests of the opinions of the Judge Advocates General. There are well known treatises written by eminent military law scholars. (See, *supra* pp. 16-19.) Both sources make clear that in the 19th Century civilians were not court martialed in time of peace. The cases which petitioners cite (if indeed they represent court martials of civilians in time of peace) are contrary to the practice and opinions of a century of Judge Advocates General. The actual practice following the Revolutionary War was that stated in the digest of opinions of the Judge Advocates General and the textwriters, not that shown in the episodic courts martial found buried in the National Archives.

E. Decisions of This Court in Other Instances of Purported Court Martial Jurisdiction over Civilians Demonstrate the Unconstitutionality of the Statute Authorizing Respondent's Trial in Time of Peace.

The principles reflected in prior decisions of this Court reinforce the conclusion that peacetime court martial jurisdiction over respondent is unconstitutional. Whenever an attempt has been made to enlarge military jurisdiction at the expense of trial by jury as it existed in 1789, that attempt has failed. *Ex Parte Milligan*, 4 Wall. 2; *Duncan v. Kahanamoku*, 327 U.S. 304; *Toth v. Quarles*, 350 U.S. 11; *Reid v. Covert*, 354 U.S. 1.

The important teaching of *Ex Parte Milligan* is that necessity can never extend the limits of military jurisdiction so as to deprive a citizen of his constitutional right to trial by jury. It would unduly prolong this brief to quote from that opinion all that is pertinent. We note only the following statement by Mr. Justice Davis:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and

covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

(4 Wall at 120-121)

Duncan v. Kahanamoku, supra, declared that the civilian petitioners could not constitutionally be tried by military courts in Hawaii during World War II. Of particular significance to the case at bar is petitioner Duncan. He was a civilian shipfitter employed in the Navy Yard in Honolulu. He was arrested, tried and convicted by the military for engaging in a brawl with two armed Marine sentries at the Navy Yard at Pearl Harbor. The other petitioner, White, was a stockbroker in Honolulu charged with embezzling stock belonging to another civilian. This Court drew no distinction between the two. It said:

"Both cases thus involve the rights of individuals charged with crime and *not connected with the armed forces* to have their guilt or innocence determined in courts of law which provide established procedural safeguards rather than by military tribunals which fail to afford many of these safeguards."

(327 U.S. at 307.) (Emphasis supplied)

In the concurring opinion of Mr. Justice Murphy is found the following:

"Both petitioners were civilians entitled to the full protection of the Bill of Rights, including the right to jury trial."

(id. at 326)

And the dissenting opinion attributes no significance to Duncan's status as a civilian employee of the Navy.

If the military could not try Duncan, a civilian employee of the Navy in Hawaii in time of war on a charge of attacking an armed sentry at the Navy Yard, it would seem to follow a fortiori that the military lacked constitutional authority to try respondent in Morocco in time of peace.

Toth v. Quarles, supra, decided that the Constitution forbade trial by court martial of a civilian ex-serviceman for an offense committed while in the service. The Court held that Clause 14, given its natural meaning:

> "would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."
> (350 U.S. at 15)

The following language is most pertinent to the case at bar:

> "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed'. We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article 3 of the Constitution."

The most recent decision is *Reid v. Covert*, supra, in which this Court held that the Constitution prevented the peacetime trial by General Court Martial of a civilian dependent charged with a capital offense. The reasoning and principles enunciated in *Reid v. Covert* all lead to the conclusion that a civilian employee charged with a non-capital felony similarly may not be tried in peacetime by general court martial.

The similarity between this case and *Reid v. Covert* is illustrated by the arguments advanced by petitioners in the two cases. In large measure, the arguments and authorities advanced are the same. The factual difference between the two cases do not provide valid reasons for different results.

1. *Reid v. Covert* involved civilian dependents, whereas

the case at bar involves a civilian employee. In the Supplemental Brief for Appellant and Petitioners on Rehearing Nos. 701 and 713, O.T. 1955, the Government stated, at p. 37, in response to the Court's inquiry, 352 U.S. 902:

> "For purposes of court-martial jurisdiction over civilians overseas in time of peace, no valid distinction can be drawn between civilians employed by the armed forces and civilian dependents."

The Government apparently has not significantly changed its position, because in this and the related cases (*Kinsella v. Singleton*, No. 22; *Wilson v. Bohlender*, No. 37) it offers no basis for distinguishing between the two categories. The same historical materials and the same arguments of "necessity" are advanced in both situations. Although it may be correct that civilian employees are more "necessary" to the armed forces abroad than dependents, no reason is advanced why peacetime court martial jurisdiction is more "necessary" in one case than the other. In fact, it could be argued that, possessing the power of dismissal over employees, the military has *less* need for peacetime court martial jurisdiction over employees than it does for dependents who are somewhat more economically independent of the military.

2. The other factual difference between this case and *Reid v. Covert* is that in the latter a death sentence was possible whereas in the case at bar, a fine[2] and five year sentence of imprisonment was the maximum penalty which could be given by the court martial. This is no valid distinction. Respondent was tried for an offense which in a civilian court would be a felony, and as such he was entitled to a trial by jury. The Constitutional distinction is not between capital and non-capital cases but between felonies and misdemeanors.

Similarly, in the historical materials said to support the

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[2] There appears to be no limit to the *amount* of the fine which could be imposed. *Table of Maximum Punishments, MCM 1951*, p. 223.

jurisdiction, no distinction is drawn between capital and non-capital offenses. And in fact, the punishment which can be inflicted by a general court martial is sufficiently grave that there should be no distinction between the capital cases and those where substantial fines and imprisonment can be meted out.

In short, the principles of *Reid v. Covert*, like those of *Ex Parte Milligan*, *Duncan v. Kahanamoku*, and *Toth v. Quarles*, are persuasive that peacetime court martial jurisdiction over civilian employees is unconstitutional.

III. THE RELATIONSHIP OF A CIVILIAN EMPLOYEE TO THE ARMED FORCES IS NOT SUCH AS TO JUSTIFY PEACETIME COURT MARTIAL JURISDICTION OVER HIM.

Respondent was not a member of the armed forces. But petitioners contend that his "connection with" or relationship to the armed forces was such that, as a matter of constitutional law, he has a status equivalent to a member of the armed forces. The fallacy of petitioners' reasoning is clear when the vital differences between respondent's status and that of an airman are considered. Respondent went to Morocco of his own free will and accord, on private transportation with an ordinary passport (R. 12). An airman in Morocco was there because he was ordered there and arrived via Government transportation without a passport. Respondent lived in Casablanca as a civilian (R. 12); an airman lived on the base at Nouasseur. Respondent was *employed* by the Air Force; an airman *enlisted* in the Air Force.

The oath of office taken by a civilian employee (5 U.S.C. § 16)[1] differs significantly from the oath taken by one enlisted in the armed forces (10 U.S.C. § 501). The civilian employee swears that he will "discharge the duties of the office on which I am about to enter." One enlisting in the

[1] See, also, Standard Form 61 and 61A of Civil Service Commission.

armed forces swears "that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice."

Respondent was paid by the hour at a rate which was fixed in accordance with Air Force regulations (AFR 14-13), and which varied depending upon the area of the world in which he was working (5 U.S.C. § 902). An airman is paid by the month at a rate which is fixed by Congress and is uniform throughout the world (37 U.S.C. § 232). Needless to say, an airman does not receive any overtime pay. Cf. 10 U.S.C. § 9025.

If respondent decided not to come to work one day, he could be docked a day's pay. If an airman decided not to report, he was guilty of absence without leave (10 U.S.C. § 886), or possibly desertion (10 U.S.C. § 885). Respondent could at any time quit his employment with the Air Force. An airman is bound to serve the term of his enlistment. Respondent could be fired at any time by the Air Force. If, for example, the Government's need for him ceased, he had no further claim. An airman, on the other hand, could not be discharged until his enlistment expired, and in fact, under some circumstances, has certain statutory rights to reenlist (10 U.S.C. §§ 8256, 8263).

As this Court said in *United States v. Grimley*, 137 U.S. 151, 152:

> "By enlistment the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on . . . ."

Respondent wore no uniform, although an airman, of course, did. Respondent worked fixed hours and outside of these working hours was free to come and go and do as he pleased. An airman, on the other hand, has his life regu-

lated 24 hours a day. He is only permitted to leave the Base with special permission, which respondent, of course, did not need.

Perhaps the most significant distinction between respondent and an airman is that the airman is continually under restraint by his Commanding Officer. An airman cannot come and go as he pleases and obviously cannot quit. In fact, his entire life is regulated by his superior officers. A civilian employee, such as respondent, is under no such compulsion. While he continues to work for the Air Force, he is only required to do his job. Beyond that, what he does is his business, not the Air Force's business.

Petitioners suggest (Pet. Br. p. 70) five factors to be considered in determining a person's "connection" with the armed forces.

The first factor is "the duties of the person." Respondent was hired as an electrician. It may be assumed that there were stationed at Nouasseur Air Depot Air Force enlisted men who performed or could have performed the same electrical work which respondent did. However, these airmen had other duties as well as their work as electricians. The airmen were trained to bear arms. They marched; they drilled; they performed "military" duties in addition to working as electricians.

Illustrative of the military status of the airman is the Code of Conduct for Members of the Armed Forces promulgated by the President as Commander in Chief (Executive Order 10631, August 18, 1955, 20 Fed. Reg. 6057, 5 U.S.C.A. p. 114). The first paragraph of the Code states:

> "I am an American fighting man. I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense."

Thus, while there is some similarity between respondent and the airman, there is also great dissimilarity in their status and the duties that each performs.

The second factor is the place of performance of those

duties. It may be conceded that in some places the uniformed personnel and respondent would work together. Obviously, since respondent had no security clearance, work in classified areas would be performed solely by armed forces personnel and obviously the "military" duties of members of the Air Force would be done at a place from which respondent was excluded. In any event, the location is not a significant factor. Mr. Justice Frankfurter, in *Reid v. Covert*, supra, at p. 46-47, rejected the idea that proximity to the armed forces was a valid justification for court martial jurisdiction in that case.

The third factor is the heirarchy of command. Respondent might receive instructions from military personnel, or civilian personnel, or, more probably, both. The significant factor is not who was able to give him "orders and instructions" but to what extent he was bound by these orders. The tremendous overriding distinction between respondent and uniformed personnel was that he was at liberty to quit his employment with the Defense Department at any time. The "orders and instructions" which he validly could be given were restricted to the narrow limits of his work. Beyond that, his life was his own, not that of the Air Force. Contrariwise, the Air Force personnel are subject to orders and instructions of their superior officers in *all* respects. Unlike respondent, all of his life is regulated by his superior officers.

The fourth factor enumerated is "the military privileges to which the person may be entitled." These privileges are said to be those military facilities normally reserved for uniformed personnel. If the use of these facilities justifies peacetime court martial jurisdiction over respondent, all other employees of the United States Government abroad would have to be included within the jurisdiction. These privileges of use of the post exchange, commissary, service club, etc., are normally made available to *all* United States Government employees employed near an overseas military installation. Thus, the Post Exchange at Nouasseur Air

Depot in Morocco extends its privileges to the State Department personnel employed in Casablanca and nearby Rabat.

The final factor cited by petitioners is "the absence of local civilian status—whether the person is in any substantial relationship to the local civilian authorities, judicial or executive." It is difficult to understand a contention that respondent has no relationship to the Moroccan Government. In respondent's own case, he was turned over by the United States Air Force police to the local Police Department in Casablanca where he was placed in the jail and subsequently interrogated by the police. The policeman later testified at the court martial and it was on the basis of this testimony that respondent was convicted (See, *Verbatim Record of Trial of Dominic Guagliardo by General Court Martial* (lodged with the Clerk), testimony of Mr. Emile Veysette, Principal Inspector, Regional Service of Judiciary Police, Casablanca, Morocco, pp. 151, et seq.). A more substantial relationship to the local civilian authorities can hardly be imagined.

When all the factors are analyzed, the essential differences between respondent and members of the armed forces become apparent. Respondent's relation to the Air Force is transient, part-time, and terminable at any time by either party. He is no more a "part" of the Air Force than any secretary in the Pentagon. Respondent's relation to the Air Force does not justify it having peacetime court martial jurisdiction over him.

IV. PEACETIME COURT MARTIAL POWER OVER CIVILIANS IS NOT "NECESSARY AND PROPER" FOR THE "REGULATION AND GOVERNMENT OF THE LAND AND NAVAL FORCES".

A. The Asserted Power Is Not "Proper".

Since respondent is not a member of the land and naval forces, nor in such a relationship to the forces to be treated as a member, he is entitled, when charged by the United States with committing a felony, to be tried by an Article III

court with the guarantees of trial by jury after indictment of a grand jury. Article 1, Section 8, Clause 14, authorizing Congress to make rules for the government and regulation of the land and naval forces, cannot be expanded by Clause 18 (the necessary and proper clause) to justify this extraordinary power because exercise of the power would conflict with other specific provisions of the Constitution. Expansion of court martial power to civilians in time of peace necessarily means an unconstitutional diminution of the judicial power under Article III. Expansion of court martial power to civilians in time of peace necessarily means depriving the civilians of the rights guaranteed them by the Fifth and Sixth Amendments.

It should be recalled that in *McCulloch v. Maryland* (U.S.), 4 Wheat. 579, Chief Justice Marshall was careful to establish that the Congress' power to incorporate was not prohibited by the Constitution. Only after finding the absence of any prohibition did he conclude that the power was necessary and proper to the enumerated powers. A similar holding cannot validly be made in the case at bar. The provisions of Article III and the Fifth and Sixth Amendments preclude any conclusion that the power asserted in this case is not prohibited by the Constitution. Since the asserted power is prohibited by other provisions of the Constitution, its use is not "proper."

Mr. Justice Frankfurter, concurring in *Reid v. Covert*, supra, 354 U.S. at 43, points out that:

> "this court, applying appropriate methods of constitutional interpretation, has long held, and in a variety of situations, that in the exercise of a power specifically granted to it, Congress may sweep in what may be necessary to make effective the explicitly worder power. See *Jacob Ruppert, Inc. v. Caffrey*, 251 U.S. 264, especially 289 et seq., . . . *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 201 . . .; *Railroad Com. v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 588 . . ."

While this statement is of course correct, as is demonstrated

by the authorities referred to, none of these cases reach the precise issue presented by the instant case. In none of the cases cited, nor any found by counsel, has this Court ever held that Congress may transgress one of the specific guarantees of the Bill of Rights in order to "make effective the explicitly worded power." The reason, as Mr. Justice Frankfurter observes at 354 U.S. at 44, is because:

> "The Constitution is an organic scheme of government to be dealt with as an entirety.

B. The Asserted Power Is Not "Necessary".

1. The Stated Reasons Why the Court Martial Power Is Needed Do Not Relate to the Mission of the Armed Forces Abroad.

The necessity for peacetime court martial jurisdiction over civilians by the military is not answered by arguments as to the necessity of civilians with the armed forces abroad. The question is not whether the armed forces need civilians as a part of their overseas installations but rather whether the military needs court martial jurisdiction over these civilians. We emphasize this fact because the petitioner devotes considerable argument to the necessity of the military being accompanied by civilians abroad. Of course, if there were no need for civilians accompanying the armed forces abroad, there would obviously be no need for court martial jurisdiction. But the converse is not necessarily true. A separate and distinct question is involved as to whether peacetime court martial jurisdiction is necessary over these civilians.

It should be observed that the reasons why petitioners say that peacetime court martial jurisdiction is necessary are the same as were presented in *Reid v. Covert* and found wanting. Petitioners offer no new reasons and also offer no reasons for distinguishing between civilian employees and civilian dependents.

Petitioners' reasons are primarily based upon the replies

which the Department of Defense solicited from overseas commanders in *Reid v. Covert*, supra. Some of the replies were printed as Appendix A in the Supplemental Brief for Appellant and Petitioner on Rehearing in *Covert*. When the replies are examined, it is apparent that the reasons stated for the necessity of court martial jurisdiction over civilians for the most part have no relation to the military's function abroad and certainly do not justify peacetime court martial jurisdiction.

Gen. William R. Woodward, Commanding General of the headquarters responsible for logistical support to United States Forces in the forward area of France and Germany, detailed his reasons for the continued need for jurisdiction over civilian employees and dependents. He stated his reasons in the following order:

> a. "To prevent black-market operations and to punish those who engage in such activities."
>
> b. "To prevent reckless and drunken driving on the public roads in France and on U. S. military installations."
>
> c. "To enable me to control them [civilian employees and dependents] in emergencies such as might occur in the evacuation of non-combatants in threatened areas."
>
> d. "To protect the security of this command and to punish those who imperil such security."
>
> e. "To insure the continued satisfactory operation of the NATO's status of forces agreement in the advance section."

1. Preventing black market operations is obviously the function of the host country. It is the host country's laws which are transgressed. It is the host country's economy which is disrupted. While the United States is interested in its allies' economic stability, it could hardly be considered that this interest is the responsibility of the Department of Defense.

2. Preventing reckless and drunken driving on French roads is clearly a function of the French Government. Preventing reckless and drunken driving on United States military installations may be part of the function of our armed

forces abroad but since these bases are legally the property of the host country, the crimes are violations of the laws of the host country. In any event, it can hardly be validly contended that to accomplish this objective requires general court martial jurisdiction over civilians. If the offense were serious, it would be a violation of the host country's laws and would be punished as such by the host country. (See, *New Legal Era for Troops and Dependents in Germany*, Army-Navy-Air Force Register and Defense Times, August 15, 1959, p. 11.) If the violation were minor, it would obviously not require a general court martial but could be handled administratively.

Of the 5,026 offenses committed by employees and dependents during the period 1 December 1954 to 30 November 1958, subject to primary foreign jurisdiction, 4,357 were "traffic offenses," including drunken and reckless driving and fleeing scene of accident. (Pet. Br., p. 75).

3. Gen. Woodward's third reason—to control civilians in emergencies such as might occur in evacuation of threatened areas—is not relevant to peacetime. It would presuppose a wartime situation in which the military would have court martial jurisdiction under Article 2(10) U.C.M.J., 10 U.S.C. § 802(10).

4. Preventing disclosure of classified information is, of course, part of the mission of the armed forces abroad, but no reason is shown why peacetime court martial jurisdiction over civilians is necessary to accomplish this objective. Only a small portion of civilian employees and dependents have access to classified information. Respondent, for example, had no clearance for classified information. Further, the offense is rarely committed. If such an offense did occur, it would be a violation of the Criminal Code (18 U.S.C. §§ 792-797) and could be prosecuted in the United States even though committed abroad (Cf. 18 U.S.C. § 791). Finally, the offense is of such gravity that trial in an Article III court would seem to be required.

5. Continued satisfactory operation of the status of forces agreements becomes a reason for peacetime court martial jurisdiction over civilians only by virtue of inverted logic. (It should be noted that there is no status of forces agreement in Morocco (Background—Three New African Nations, Morocco-Tunisia-Libya, Dept. of State Publication 6567, December 1957, page 11), where respondent lived and worked for the Air Force.) Without these agreements, jurisdiction over crimes committed by Americans in the host country lies in the host country. *Schooner Exchange v. McFaddon*, 7 Cranch 116. The status of forces agreements were negotiated to vest this jurisdiction in the American military rather than in the host countries. The primary purpose of the agreements was to change the jurisdiction from that of the host country to that of the American military in the case of *members* of the armed forces. Civilians were not the major concern of the negotiations. And even in the case of civilians, most agreements provide that primary jurisdiction over civilian dependents lies in the host country rather than in the American military. In any event, a decision by this Court that peacetime jurisdiction of civilians is unconstitutional would simply return jurisdiction to the host country, where it was prior to the status of forces agreement.

Gen. Bruce C. Clarke, Commanding General of the headquarters for all United States Army combat units stationed in Western Germany, stated that: "Court martial cases involving civilian dependents are comparatively rare." He states that our relations with the German Government are embarrassed by the commission of "comparatively minor offenses such as black market transactions with German nationals, unlawful currency transactions, infringement of German customs laws and violation of German traffic laws" (id., p. 107). Gen Clarke stated: "If the military lacks the authority to punish civilian dependents for such offenses, the result would be to increase the incidence of these offenses upon the part of the military." This is, of course, no

valid reason for peacetime court martial jurisdiction over civilians. The question is not whether but how civilians are to be tried. As Mr. Justice Frankfurter observed in *Reid v. Covert*, 354 U.S. at 48:

"The method of trial alone is in issue."

Gen. Charles D. Palmer, Commanding General of the operational headquarters for all United States Army units based in Japan, Okinawa and Korea, states that black market offenses "by civilians as well as military personnel, although relatively minor offenses, have represented a continuing problem to this Command because of the concern of the Government of Japan with the effect of these offenses upon the local economy" (id., p. 114). The statement itself illustrates that the problem involved is one of the host country, not one related to the function of the armed forces abroad.

Capt. J. P. Walker, Commander of the United States Naval Activities in Spain, states as an additional basis for the necessity which justifies peacetime court martial jurisdiction over civilian dependents abroad, the language barrier (id., p. 123). While this is undoubtedly a problem to an American charged with a crime by a foreign country, it would seem obvious that the problem can be solved by the use of interpreters.

Petitioner's stated reasons for the peacetime court martial jurisdiction over civilians are also premised upon the assumption that these civilians live abroad in "American enclaves" which are somehow isolated and apart from the host country. The premise does not bear up under analysis. Even for members of the armed forces, the military does not take over all judicial functions in its "American enclaves." For example, in civil suits even between Americans, jurisdiction lies in the foreign country. Similarly, the American military does not exercise any jurisdiction over marriage, divorce, or matters of probate law. See, O'Donnell, *The American Invasion of Spain*, Saturday Evening Post, Jan. 28, 1958, pp. 26, 87-90.

Finally, it should be noted that even for members of the armed forces, not all crimes are deemed necessary to be tried by a court martial. In the United States, for example, non-military offenses are almost always tried in State or Federal courts, not in court martials. Even abroad, in situations where primary jurisdiction lies in the United States, it is often waived and there are, of course, numerous situations where primary jurisdiction even over members of the armed forces belongs to and remains in the host country. *Wilson v. Girard*, 354 U.S. 524.

2. No Valid Explanation is Given for Treating Respondent Differently from Other Americans Employed by the United States Abroad, and from Indigenous Employees.

Not all persons employed by the United States Government abroad are made subject to court martial jurisdiction and no valid explanation is given for differentiating between the various categories.

As of 1957, the Department of Defense employed 76,514 non-American civilians in foreign countries, and contracted with foreign governments for the employment of 275,640 additional indigenous personnel. See, U.S. Civil Service Commission, *Federal Employment Statistics Bulletin*, October, 1956, p. 9; See, also, 103 Cong. Rec. 614 (daily id. Jan. 17, 1957). As of June there were 188,517 foreign nationals working under contract arrangements. 105 Cong. Rec. p. 13387 (daily id. July 30, 1959).

These indigenous employees have as much access to our overseas bases as do the 25,000 employees such as respondent. Their jobs are in many cases identical to American civilian employees. Yet there is no court martial power over these civilians and no request to Congress or the host countries that they be made subject to United States court martial jurisdiction. The Armed Forces abroad apparently function and successfully execute their assigned missions

without court martial power. No valid reason has been offered to distinguish respondent from these other Defense Department employees. Hence, since the forces can operate successfully without court martial power over large numbers of its employees, it seems obvious that it could operate successfully without court martial power over 25,000 of its employees who are United States citizens.

In addition, other dependents of the United States Government employ 59,656 American citizens abroad. As of June 30, 1959, there were 26,949 employed by the State Department; 8,088 employed by United States Information Agency; 1,521 employed by the Federal Aviation Agency, and 1,221 employed by the Department of Agriculture. 105 Cong. Rec. p. 13386 (daily ed., July 30, 1959). None of these American citizens is subject to court martial jurisdiction and no valid reason is advanced why the 25,000 citizens employed by the Defense Department should be treated differently. If there is a strong, compelling necessity for subjecting Defense Department employees who are United States citizens to peacetime court martial, it would seem there would be a similar necessity in the case of other United States citizen employees abroad. No necessity is shown and it must be concluded that the other departments of the Government function successfully without this extraordinary power.

Further, American tourists and Americans employed by private concerns abroad make themselves subject to foreign jurisdiction. There is no valid reason why those Defense Department employees who are United States citizens should be singled out for court martial jurisdiction, and the others left subject to the jurisdiction of the foreign countries. It would be far more consonant with our traditions that civilians be tried by civilian courts (foreign civilian courts, if need be) than to have civilians tried by courts martial in time of peace.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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